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 9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA

11 HOUTAN PETROLEUM, INC.	)	Case No. 3:07-cv-5627
	)	
12 Plaintiff,	)	<b><u>CONOCOPHILLIPS COMPANY'S</u></b>
	)	<b><u>OPPOSITION TO HOUTAN</u></b>
13 vs.	)	<b><u>PETROLEUM'S MOTION TO DISMISS</u></b>
	)	<b><u>COUNTERCLAIMS</u></b>
14 CONOCOPHILLIPS COMPANY, a Texas	)	
corporation and DOES 1 through 10,	)	<b>Date: February 6, 2008</b>
15 Inclusive	)	<b>Time: 10:00 a.m.</b>
	)	<b>Courtroom: 1</b>
16 Defendants.	)	<b>Before: Hon. Samuel Conti</b>
_____	)	

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 18  
 19 Defendant and Counter-Plaintiff ConocoPhillips Company ("ConocoPhillips") submits  
 20 this opposition to Plaintiff and Counter-Defendant Houtan Petroleum, Inc.'s ("Houtan  
 21 Petroleum") motion to dismiss ConocoPhillips' counterclaims.

22 **I. INTRODUCTION**

23 Houtan Petroleum's motion to dismiss argues that the PMPA preempts all inconsistent  
 24 law regarding franchise termination. However, ConocoPhillips' counterclaims do not address  
 25 the propriety of the franchise termination, an issue the Court has already resolved in  
 26 ConocoPhillips' favor. Rather, ConocoPhillips' counterclaims address Houtan Petroleum's *post-*  
 27 *termination wrongful conduct*; specifically its failure to return ConocoPhillips' equipment and  
 28 improvements or pay rent *after* the termination of the franchise agreement.

Houtan Petroleum argues that the PMPA preempts ConocoPhillips' counterclaims because ConocoPhillips was allegedly required, but failed, to make a bona fide offer to sell Houtan Petroleum the equipment and improvements. This argument asks the Court to presume that ConocoPhillips' offer was not bona fide, yet that is the very issue raised by Plaintiff's complaint. Such a factual finding is impermissible on a motion to dismiss, and Houtan Petroleum's motion must therefore be denied.

## II. ARGUMENT

### A. Applicable law

"In enacting the PMPA, Congress attempted to provide national uniformity of petroleum franchise termination law.' [Citation.] That uniformity 'would be frustrated' if the PMPA did not preempt 'all inconsistent state law.' [Citation.] Section 2806(a) of Title 15 provides for preemption of all state law with respect to termination of a petroleum franchise which is inconsistent with the PMPA." *Unocal Corp. v. Kaabipour*, 177 F.3d 755, 768 (9th Cir. 1999). However, "[t]he preemptive scope of the PMPA is limited; it does not reach any state laws which only incidentally affect franchise termination or nonrenewal." *Id.*; see also *Pride v. Exxon Corp.*, 911 F.2d 251, 258 (9th Cir. 1990) ("the Act 'does not preempt every state law that relates remotely to the termination or nonrenewal of petroleum franchises; but it does preempt any state law with respect to "grounds for, procedures for, and notification requirements" with respect to terminations and nonrenewals').

"The PMPA does not attempt to govern everything that happens in a motor fuel franchise relationship. State contract law continues to govern where not preempted, as does state tort law." *Sun Chase Enterprises, Inc. v. Swati Enterprises, Inc.*, 143 S.W.3d 902, 905 (2004) (citation omitted); see also *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 593 (3rd Cir. 1989) "[t]he goal of the framers of the PMPA was to create a uniform system of franchise termination, not a uniform system of contract law. . . . There is no reference to any legislative intent to preempt the general common law of contract, even to the extent that it may become involved in a PMPA action (citation omitted).

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1 Common law claims for rental obligations that accrue after the termination of a franchise  
 2 agreement are not preempted by the PMPA. *See Koylum Inc. v. Peksen Realty Corp.*, 357  
 3 F.Supp.2d 593 (E.D.N.Y. 2005) *affirmed in part, vacated in part in Koylum Inc. v. 1677 Ridge*  
 4 *Road Realty Corp.*, 2005 WL 3528781 (2nd Cir. 2005). In *Koylum Inc.*, the franchisor  
 5 terminated its franchise agreement with its franchisee and then initiated proceedings in state  
 6 court to dispossess the franchisee from the property after it refused to vacate. 357 F.Supp.2d at  
 7 595.<sup>1</sup> Subsequently, the franchisee filed suit in federal court alleging violations of the PMPA  
 8 and a right to purchase the premises. *Id.* After the franchisor prevailed at trial on the PMPA  
 9 claims and the court found that the franchisee was a holdover tenant, the franchisor sought rent  
 10 from the franchisee for the period from the termination of the franchise agreement until the end  
 11 of trial plus interest pursuant to a liquidated damages clause in the franchise agreement. *Id.* The  
 12 Court granted the franchisor's request on a motion for summary judgment and ordered the  
 13 franchisee to pay \$373,438.54 in back rent plus interest and previously awarded costs. *Id.* at  
 14 597. On appeal, the trial court's order was affirmed, although the tenancy period was shortened.  
 15 *Koylum Inc.*, *supra*, 2005 WL 3528781 at \*2.

16 Houtan Petroleum has not cited any case establishing that ConocoPhillips is *not* legally  
 17 entitled to recover its property and receive reasonable rent for the period during which Houtan  
 18 Petroleum wrongfully refused to return ConocoPhillips' property. Further, Houtan Petroleum  
 19 has not cited any case establishing that the PMPA preempts common law claims for return of  
 20 property and reasonable rent *after* the termination of a franchise agreement.

21 **B. ConocoPhillips' counterclaims do not address the franchise**  
 22 **termination and thus do not conflict with the PMPA**

23 The parties' sublease and franchise agreement (the "Franchise Agreement") terminated  
 24 on October 31, 2007, when ConocoPhillips' underlying property lease expired. As the Court has  
 25 already recognized, the Franchise Agreement explicitly contemplated, and provided for  
 26 termination upon such an occurrence. (Docket No. 18 at 3:10-4:10.) The termination thus was  
 27 not the result of any improper act -- or any act at all -- by ConocoPhillips. Rather,

28 <sup>1</sup> A more complete recitation of the facts for *Koylum Inc. v. Peksen Realty Corp.* is laid out in  
*Koylum Inc. v. Peksen Realty Corp.* (E.D.N.Y. 2002) 223 F.Supp.2d 405.

1 ConocoPhillips was prevented from extending or renewing its underlying lease by Houtan  
2 Petroleum's negotiation of its own lease agreement directly with the property owner. (*Id.* at 5:5-  
3 11.) Accordingly, this Court has already found that ConocoPhillips' termination of the franchise  
4 agreement was appropriate under the PMPA. (*Id.* at 8:20-11:13.)

5 The franchise agreement further provided that upon its termination or expiration, Houtan  
6 Petroleum was obligated to surrender all station property to ConocoPhillips. (Docket No. 5 Ex.  
7 A at ¶ 32.) Houtan Petroleum has refused to do so, however, but instead remains in possession  
8 of ConocoPhillips' equipment and improvements, without paying rent. It claims that merely by  
9 commencing an action under the PMPA it is entitled indefinitely to use ConocoPhillips' property  
10 for free. This is precisely the contention Houtan Petroleum made in its application for  
11 preliminary injunctive relief. The Court denied that application, and in doing so recognized that  
12 if Houtan Petroleum wished to maintain use and possession of ConocoPhillips' improvements  
13 pending the litigation, it could agree to an interim rental with ConocoPhillips. (Docket No. 18 at  
14 16:7-14.) Despite the Court's ruling, Houtan Petroleum refuses to pay rent until the merits of its  
15 claim are adjudicated.

16 Houtan Petroleum's argument that the PMPA preempts inconsistent state laws related to  
17 franchise termination and non-renewals misses the point. ConocoPhillips' counterclaims do not  
18 address the "grounds for, procedures to, and notification requirements with respect to  
19 termination and nonrenewals" (*Pride*, 911 F.2d at 258), nor do they ask the Court to rule on the  
20 propriety of the termination, though, as the Court has already found, the termination was clearly  
21 proper. Regardless of the merits of Houtan Petroleum's PMPA claim, in the absence of  
22 provisional relief requiring ConocoPhillips to leave its property in place, there was, and is, no  
23 legal basis for Houtan Petroleum's refusal either to pay rent or return the property.  
24 ConocoPhillips' counterclaims simply seek damages for this wrongful conduct and the return of  
25 its property.

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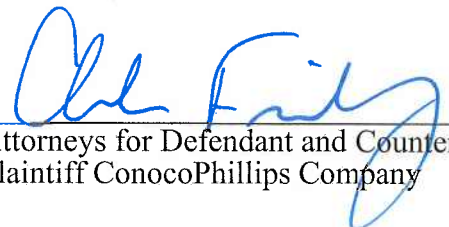
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1 **III. CONCLUSION**

2 ConocoPhillips is entitled to the return of its property and reasonable rent for the period  
3 Houtan Petroleum has wrongfully retained possession of the property. Plaintiff's motion should  
4 be denied.

5 Dated: February 4, 2008

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